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C.E. Butters Realty and Construction, Inc. v. Robert McFarland, Renae W. McFarland, Tim Bovee dba Bovee Construction Company; Mervin Holgate dba Holgate and Sons Construction Company: Brief of Appellant

Utah Court of Appeals

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J. Paul Stockdale; attorneys for defendants.
Joseph M. Chambers; Harris, Preston, Chambers; attorney for plantiff.

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IN THE UTAH COURT OF APPEALS

C.E. BUTTERS REALTY AND CONSTRUCTION, INC., d/b/a Butters Construction, Plaintiff/Appellant vs. ROBERT McFARLAND, Trustee, RENAE W. McFARLAND, Trustee TIM BOVEE, Defendants and Counterclaimants TIM BOVEE, d/b/a BOVEE CONSTRUCTION COMPANY; MERVIN HOLGATE, d/b/a HOLGATE & SONS CONSTRUCTION COMPANY; ROBERT McFARLAND, Trustee, and RENAE W. McFARLAND, Trustee, Third-party Plaintiff	*	Priority No. 15 Court of Appeals Case No. 20020571-CA Second District Case No. 97-090[illegible]

BRIEF OF APPELLANT

Appeal from an Order of the
Second Judicial District Court
Weber County, Utah
The Honorable Pamela Heffernan Presiding

J. Paul Stockdale
795 East 24th Street
Ogden, Utah 84401

Attorney for Defendants,
Counterclaimants
Third-party Plaintiff
Appellees

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Counterclaim Defendant
Third-party Defendants
Appellants

FILED
Utah Court of Appeals
JUN 09 2003

IN THE UTAH COURT OF APPEALS

C.E. BUTTERS REALTY AND CONSTRUCTION, INC., d/b/a Butters Construction, Plaintiff/Appellant vs.	*	Priority No. 15
ROBERT McFARLAND, Trustee, RENAE W. McFARLAND, Trustee, TIM BOVEE, Defendants and Counterclaimants	*	Court of Appeals Case No. 20020571-CA
TIM BOVEE, d/b/a BOVEE CONSTRUCTION COMPANY; MERVIN HOLGATE, d/b/a HOLGATE & SONS CONSTRUCTION COMPANY; ROBERT McFARLAND, Trustee, and RENAE W. McFARLAND, Trustee, Third-party Plaintiffs	*	Second District Case No. 97-090-7206 CV

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Logan, UT 84321

Attorney for Plaintiff
Counterclaim Defendant
Third-party Defendants
Appellants

LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the District Court:

1. Robert and Renae McFarland, Trustees (landowners), Mervin Holgate, d/b/a Holgate & Sons Construction (general contractor), and Tim Bovee, d/b/a Bovee Construction Company (asphalt and excavation - specialty contractor) Defendants/Appellees, are represented by J. Paul Stockdale, Ogden, Utah.

2. C. E. Butters Realty and Construction, Inc., a Utah corporation, Plaintiff/Appellant, and Kent Butters and Becky Butters, Third-party Defendants/Appellants are represented by Joseph M. Chambers of HARRIS, PRESTON & CHAMBERS, Logan, Utah. (97-090-7206 CV - District Court)

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JURISDICTION

The Utah Supreme Court has original jurisdiction over this matter pursuant to Utah Code Ann. §78-2-2(3)(j) and Utah R. App. P. Rules 3 and 4. Pursuant to §78-2-2(4), Utah Code Annotated, the Utah Supreme Court transferred this matter to the Utah Court of Appeals.

ISSUES PRESENTED FOR REVIEW

1. Does the trial court abuse its discretion when it misapprehends the scope of the expert witnesses' unrefuted testimonies and refuses to be guided by credible, uncontradicted

evidence when all other reasonable minds would accept it? Was the unrefuted expert testimony of Butters two civil engineers in conflict?

Standard of Review: A trial court's decision to admit expert testimony is reviewed for an abuse of discretion. Patey v. Lainhart, 1999 UT 31, ¶ 33, 977 P.2d 1193; The court's prerogative, of course, does not go so far as to permit it to stubbornly ignore and refuse to be guided by credible, uncontradicted evidence when all reasonable minds would accept it. That could result in arbitrary and unreasoning denial or distortion of justice. De Vas v. Noble, 369 P.2d 290, 13 Utah 2d 133, (Utah 1962).

Citation to Record Where Issue Preserved: Notice of Appeal. *(Record 919 - 922)*; Appellant's Docketing Statement.

2. Is a monetary "offer of judgment" which addresses only part of the claims before the trial court, and leaves unresolved all of the counterclaims and attorney fees, less favorable or more favorable than a judgment of foreclosure which resolved all claims in the pending litigation?

Standard of Review: "The interpretation of a statute [or rule of the Court] poses a question of law which this court reviews for correctness and without deference to the lower court's conclusions." Zoll and Branch, P. C. v. Asay, 932 P.2d 592, 593 (Utah 1997).

Citation to Record Where Issue Preserved: Motion for New Trial *(Record 826- 846)*; Appellant's Docketing Statement.

3. Did the trial court err when in setting the award of attorney fees it failed to adhere to the express language of Rule 68 limiting the effect of an Offer of Judgment to only allocation

of costs, particularly when such is in contravention of the Court of Appeals "prevailing party" standard adopted in A.K. & R Whipple v. Guy, 47 P.3d 92 (Utah App. 2002)?

Standard of Review: "The interpretation of a statute [Section 38-1-18 U.C.A.] poses a question of law which this court reviews for correctness and without deference to the lower court's conclusions." Zoll and Branch, P. C. v. Asay, 932 P.2d 592, 593 (Utah 1997).

Citation to Record Where Issue Preserved: Motion for New Trial *(Record 826- 846)*; Appellant's Docketing Statement.

APPLICABLE STATUTES AND RULE

Rule 68 U.R.C.P. in pertinent part provides as follows:

> **(b) Offer Before Trial.** At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party *an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.* If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.* The fact that an offer is made but not accepted does not preclude a subsequent offer. *(Emphasis supplied by the Appellant)*

§38-1-18 U.C.A. at the time of trial provided:

§ 38-1-18. Attorneys' fees.

Except as provided in Section 38-11-107, in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

§38-1-18 U.C.A. which became effective April 30, 2001, now provides:

§ 38-1-18. Attorneys' fees--Offer of judgment.

(1) Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

(2) A person who files a wrongful lien as provided in Section 38-1-25 is not entitled to recover attorneys' fees under Subsection (1).

(3) A party against whom any action is brought to enforce a lien under this chapter may make an offer of judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs and attorneys' fees incurred by the offeror after the offer was made.

Amended by Laws 1961, c. 76; Laws 1995, c. 172, § 4, eff. May 1, 1995; Laws 2001, c. 257, § 1, eff. April 30, 2001.

STATEMENT OF THE CASE

A. NATURE OF THE CASE: This appeal is from the judgment of the Second District Court, Weber County, which entered a judgment and order of foreclosure of Butters' mechanics' lien, granted affirmative relief on Butters' bonding statute cause of action and

dismissed the counterclaim and third-party causes of action filed by the Defendants against the Plaintiff and the Plaintiff's officers individually. The Plaintiff sought an order of foreclosure of its mechanics' lien pursuant to the Utah Mechanics' Lien Statute (§38-1-1 et seq.) and a personal or monetary judgment against the owner of the property pursuant to the Utah Bonding Statute (§14-2-1 et seq.). Following five (5) days of trial, the court determined the total value of the materials, labor, and equipment the Plaintiff had provided to Subway Sandwich property located in Farr West, Weber County, Utah, and ordered the Plaintiff's attorney to prepare a Judgment and Order of Foreclosure and the necessary Findings of Fact and Conclusions of Law which were submitted to the court on May 24, 2001.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW:

On November 14, 1997, the Plaintiff, Butters Construction, filed suit seeking to collect for the fill material, labor, and equipment it had provided to the Farr West Subway Sandwich construction site (property) owned by the Defendant McFarlands. Butters alleged it was entitled to protection under two theories: (1) foreclosure of the mechanics' lien it had filed for the value of the materials, labor, and equipment it had used to enhance the property; and (2) judgment against the property owners under the Utah Bonding Statute.

Defendants Bovee, Holgate, and McFarlands subsequently filed an independent action against Kent and Becky Butters for slander of title and interference with prospective economic advantage. On December 2, 1998, the matters were consolidated and the

Defendants' claims were merged and restated into a separate counterclaim and third-party complaint alleging six (6) causes of actions:

Count 1 - Declaratory relief that the value of the material, labor, and equipment delivered to the property was limited to just $9,755.00;

Count 2 - Slander of title for an unspecified amount (to be proven at trial);

Count 3 - Interference with prospective economic advantage of Tim Bovee $27,000.00;

Count 4 - Interference with prospective economic advantage of Merv Holgate $32,000.00;

Count 5 - Judgment for all attorney fees (unspecified sum); and

Count 6 - Punitive damage claim seeking $20,000.00.

In addition, there was a counterclaim or offset for damages for negligent compaction and/or breach of warranty due to an alleged lack of compaction. *(Record 229-241)*

On April 19, 1999, the Defendants submitted a monetary Offer of Judgment under Rule 68 U.R.C.P. *(Record 331-346)*

On February 15, 2000, Butters Construction filed a Motion for Partial Summary Judgment re: Bonding Statute claims which was granted following a hearing on July 11, 2000. *(Record 360-369)* The Motion for Partial Summary Judgment was filed to limit the scope of the trial to the issue of the value of the material, labor, and equipment which Butters had provided to the property. Bench trial was set and reset several times over the course of

the next few months each time being bumped due to a criminal matter having a higher priority. Trial occurred over a period of five (5) days on April 25, 26, and 27, 2001, and May 7 and 9, 2001. *(Record 511- 523)*

Following trial, Affidavits for Attorney Fees, Objections to Proposed Findings of Fact and Conclusions of Law and Motions for a New Trial were filed by both parties. *(Record 549, 659, 700, 725, 784, 826, and 885)* On March 5, 2002, the trial court held an Objection Hearing and entered judgement granting foreclosure on April 4, 2002. *(Record 725, 916 -919)*

C. STATEMENT OF FACTS:

Overview: In early November of 1996, the Plaintiff, C. E. Butters Realty and Construction, Inc. (hereinafter "Butters Construction") was contacted to provide excavation materials to a construction site in Farr West, Utah. The parties entered into an oral contract which provided that the Plaintiff would be paid $95.00 per load of material delivered to the construction site.[1] A dispute arose as to the amount of material which was in fact delivered to the site. The Defendants (property owners - McFarlands, general contractor - Holgate, and a sub-contractor who was in charge of the excavation of the site - Bovee) refused to make any payment (even the undisputed amount they acknowledged was due to Butters), claiming that the

---

[1] The standard in the industry is to weigh the material at the pit and charge by the ton. Butters had not yet moved their scale to this pit and because there was no scale available, the parties agreed to a price based upon a truck load of material.

amount of materials which the Butters had invoiced was far in excess of the amount of materials that could have possibly been delivered to the site.

In order to establish the amount of materials which were in fact delivered to the site, discovery was undertaken and engineers (professional expert witnesses) were retained by the Butters to establish: A) the amount of material delivered to the site was as claimed by Butters; and, B) the material was from Butters' pit, not another source as claimed by Bovee. During the course of trial, the expert witnesses presented their testimony which was uncontroverted by any other expert witness. Notwithstanding, the trial court refused to give any value to the expert witnesses (finding the two experts' testimonies conflicted with one another) and determined the amount of material delivered to the site, along with the reasonable value of the material, and awarded damages accordingly. The amount was far less than proven by Butters' evidence (and by their expert witnesses).

Prior to the trial, the Defendants submitted an Offer and Judgment under Rule 68. The Offer of Judgment referred to was specifically a monetary judgment which reserved attorney fees and did not address at all the counterclaims and third-party claims against Butters. The judgment which the Plaintiff eventually obtained was a judgment of foreclosure, included attorney fees, and dismissed the counterclaims and third-party claims against Butters. During post-trial motions, the trial court made a legal determination that the monetary Offer of Judgment (even though it only addressed part of the litigation) was legally equivalent to the judgment of foreclosure and order dismissing all of the Defendants' counterclaims and third-party claims.

Because the amount recovered was approximately $500.00 less than the Offer in Judgment (not considering the attorney fees), the trial court allowed the Defendants to offset against the judgment all of their costs incurred post Offer of Judgment.

The Findings and Conclusions which the Appellant believes are in resolving the appeal are set forth below. Note: The Findings and Conclusions which are challenged are type set in *italics*.

Trial Court's Findings of Facts:

1. Plaintiff C. E. Butters Realty and Construction, Inc. ("Butters") is a Utah corporation duly organized and existing under the laws of the State of Utah and is doing business as C. E. Butters Construction, with its principal offices located in Weber County, Utah.

2. Butters holds both a General Engineering (E100) and General Building Contractor's (B100) license - License No. 93-259800-5501.

3. Kent Butters, a Third Party Defendant is the President of the Plaintiff corporation.

4. Becky Butters, a Third Party Defendant is an officer of the Plaintiff corporation.

5. The Defendants, Counterclaimants and Third-Party Plaintiffs Robert McFarland and Renae McFarland ("McFarlands") are the owners of the property, which is

the subject matter of this litigation. The property is located in Farr West, Weber County, Utah, and is described as follows:

> Part of the Southwest quarter of Section 25, Township 7 North, Range 2 West, Salt Lake Base and Meridian: beginning at a point 16.4 feet North and 885.58 feet, more or less, North 89D15' East 399.72 feet, more or less to the West right of way line of the Southern Pacific Railroad, thence North 19D01' West 591.07 feet, thence West 236.5 feet, thence South 0D41'12" East 571.18 feet, more or less, to the point of beginning. Except 0.13 acre in county road (939-221).
>
> (This property is now know as all of Lot 1 and 2, R B McFarland Subdivision, Farr West city, Weber County, Utah.)

6. The Third-Party Plaintiff Mervin Holgate, d/b/a Holgate & Sons Construction Company ("Holgate") is a licensed General building Contractor.

7. The Defendant, Counterclaimant and Third-Party plaintiff Tim Bovee, d/b/a Bovee Construction Company ("Bovee") is a licensed Concrete, Asphalt and Excavation (specialty) Contractor.

8. The McFarlands, owners of the property, entered into a written contract with Holgate, to construct a "Subway Sandwich Shop" and a roadway to the east of the Subway site, pursuant to certain plans and specifications for that site. This contract was entered into on October 7, 1996.

9. Mr. Holgate, in turn, entered into a written contract with Bovee and subcontracted a portion of the work, specifically the site work to Bovee Construction. The site work encompassed excavation of the ground for footings for a building, preparation of and pouring of the footings and pad on which the building sits, importation of fill, the curb

& gutters and other cement and asphalt work for the parking lot and a roadway adjacent to and on the east side to the Subway Sandwich Shop. Bovee's contract encompassed performing all of the necessary compaction requirements for the site work.

10. Mr. Bovee testified he had a bid to import aggregate material from Parson's Construction, but due to the time of year and the construction year end press to complete their own projects Parsons was not in a position to fulfill that bid. As a result, Bovee was in need of a source of supply for aggregate material because as testified to by Holgate everyone understood that the asphalt plants would be closing around November 15th.

11. As of the end of October and the first of November 1996, Bovee hired John Owens with the specific instructions to locate a source of materials, the necessary equipment and to oversee the asphalt phase of the project. John Owens was brought onto the site to oversee all the phases for asphalt work and to make the job "asphalt ready."

12. On or about November 4, 1996, Owens contracted Butters to see if they could supply aggregate materials to the site and also if they had equipment and men to assist in the job as the weather was starting to turn and there would need to be a push to timely complete the work.

13. Owens went to Butters' gravel pit and viewed the only material that they had available which was pit run. Butters referred to this material as natural road base material, and John Owens understood that the material was not State Spec Road Base.

14. Owens was told that Butters' trucks were fully utilized on other jobs they were trying to complete, (one was major storm clean-up for Ogden City) and as a result Butters agreed to supply materials on a per-truckload basis as they could fit loads in between the other projects they were committed to.

15. Owens arranged for Butters to provide aggregate materials at the price of $95.00 per 13 ton truckload.

16. Butters also agreed to supply certain equipment to be charged on an hourly rate specifically: $95.00/hour for the grader; $85.00/hour for the loader; $40.00/hour for the compactor with an operator and $25.00/hour without an operator. Owens testified he knew that Butters could not provide an operator for the compactor - and that he made arrangements for his daughter's fiancé to operate the compactor.

17. Butters had no written contract with Bovee. Their obligation to the site (supported by the testimony of Ernie Butters, Kent Butters, and John Owens) is that they did not undertake to assume the responsibility to make the site "asphalt ready". Nor did Butters assume the obligation to compact the materials to any specified level of compaction.

18. John Owens was the person responsible for the compaction and he testified that in the area where there is failure on the concrete that he graded and compacted the area.

19. There was a dispute between the parties as to the amount of materials that Butters delivered to the site.

20. The Plaintiffs presented evidence as to the amount of material, time and hours of the equipment, the agreed rates for the various materials delivered, as well as what reasonable rates are for this type of material and the reasonableness for the use of the equipment that were billed to the site.

21. The Butters' records contained numerous corrections that rendered them unreliable.

22. Further, no load tickets were ever provided to or made available to John Owens or Bovee Construction until after the completion of this job.

23. *The expert testimony of two engineers presented by Butters regarding the amount of fill imported to the site was conflicting and not helpful to the Court in determining the number of loads delivered by Butters to the site.*

24. The best evidence of the amount of material would have been the accounting by Butters, but since their accounting was clearly inaccurate and unreliable, the Court was forced to adopt an alternative method of calculation.

25. *The court finds from evidence presented that the reasonable value of the materials, equipment and labor Butters provided to the site is $17,978.74 as of the date they left the site, which was around November 25, 1996. The number of loads of material was calculated based on a combined analysis by Mrs. Bovee of the original bill delivered to the Bovee and the modified time cards maintained by the Butters. Approximately 182 loads were documented in the paperwork. From that amount the court deducted for loads*

delivered in a truck with a bed liner and deducted 26 loads that the court finds were not delivered on November 16. The court finds that on average the loads delivered weighed 11.28 tons. Since the parties agreed to 13 ton loads on average, the amount of material delivered was 255.77 tons short of the agreed upon amount. That amount divided by 13 tons yielded an amount of 19.67 loads short of what had been agreed to, leaving a determination that 129 loads should have been charged for at $95.00 per ton. The total of $17,978.24 was arrived at by adding grader time and the remainder of charges for equipment as set forth in the trial exhibits.

26. Butters have never been paid for the material, or the use of their equipment or labor provided although an Offer of Judgment was made by Defendants on January 12, 1999 of $20,000.00.

27. Butters filed a lien against the subject property on February 13, 1997 as filing No. 1455231 which was recorded in Book 1847 Page 2598 in the Weber County Recorders Office, Weber County, Utah.

28. The parties were unable to settle the matter and on November 12, 1997, Butters filed a Lis Pendens and Complaint.

[29 - 50 contained technical findings relative to Butters compliance with the various statutory requirements of both the mechanics' lien statute -Title 38, Chapter 1 U.C.A. and the bonding statute - Title 14, Chapter 2 U.C.A.]

51. The acceptance or retention by Defendants, and any parties claiming, by through, or under them, under such circumstance, makes it inequitable for them to retain the benefits conferred without payment of its value.

52. Except as to the Counterclaim and Third-party cause of action involving the damage to the concrete (Count 5-as to which the court found was Bovee's responsibility through his employee Owens), no other evidence was introduced as to any of the elements of the Third-Party Plaintiff's causes of action including damages suffered by the Counterclaimant's/Third-Party Plaintiff's as alleged in the other causes of action including the Slander of Title (Count 2-McFarland's claim unspecified damages "damages in the amount capable of proof at trial"); Interference with Prospective Economic Advantage (Count 3-Bovee claim for $27,000); Interference with Prospective Economic Advantage (Count 4-Holgate claim for $32,000.00).

Conclusions of Law

1. The Plaintiff has fully complied with the legal requirements of Title 38, Chapter 1, in connection with the filing and enforcement of the mechanics' lien and is entitled to an order of foreclosure in relationship to the property described above.

2. The Defendant McFarlands failed to comply with the provisions of the Utah Bonding Statute as set forth in Title 14, Chapter 2, and therefore the Defendant McFarlands are personally liable to the Plaintiff for their failure to acquire and/or exhibit bond.

3. The Plaintiff is entitled to a reasonable attorney fees in connection with pursuing its claim to enforce the mechanics' lien under the provisions of §38-1-18 U.C.A., which provides that the successful party in lien foreclosure action shall be awarded its reasonable attorney fees in enforcing the lien. *Said reasonable attorney fees and costs are only to be assessed up until the time the Defendant filed their Offer of Judgment with the Court and the amount of the fee awarded shall be in conformity to the Court's decision dated August 3, 2001.*

4. Butters has a valid and subsisting lien on the Defendant's interest in the subject property in the amount of $17,978.24 plus attorney fees and costs as of the date of judgment, together with interest thereon at the legal rate accumulating as of and from the date of the judgement.

5. The court hereby determines the priority of said claim to be superior . . . .

6. The Plaintiff is entitled to an order of foreclosure of the property . . . .

7. *Defendants are entitled to recover taxable costs incurred after the date of their Offer of Judgment in conforming with the court's decision dated August 3, 2001.*

8. Defendants, counterclaimants, and third-party Plaintiffs' claim for declaratory relief (Count 1) that all that is due the Plaintiffs is the sum of $9,000.00 is denied.

9. The McFarlands' third-party claim for slander of title (Count 2) is denied for a lack of proof as to any of the requisite elements, including any proof of having suffered any damages.

10. Bovee's third-party claim for interference with prospective economic advantage (Count 3) is denied for a lack of proof as to any of the requisite elements, including any proof of having suffered any damages.

11. Holgate's third-party claim for interference with prospective economic advantage (Count 4) is denied for a lack of proof as to any of the requisite elements, including any proof of having suffered any damages.

12. Defendants, counterclaimants and third-party Plaintiffs claim for damages for breach of contract and/or breach of warranty of the compaction obligation and for damages in the amount of $14,000.00+ to replace the drive-thru is denied for the reasons stated above.

SUMMARY OF ARGUMENT

The trial court's finding that the two engineering experts respective testimonies conflicted with one another is not supported by the record. On the Contrary their testimony simply demonstrates that they approached the problem (how much material was imported to the site and how much is attributable to Butters) from different angles using different methodology. Mr. Nelson testified as to the total amount of material imported to the site by all parties. Mr. Rush testified as to the amount of material imported to the site by Butters. There was no conflict in their respective testimony. If anything their testimony merely book ended the issue.

The trial court's legal conclusion, i.e., that a monetary judgment which only disposes of a portion of the pending claims, and leaves the issue of attorney fees unresolved is more

favorable than judgment of foreclosure which includes attorney fees and dismisses the Defendants' counterclaims and third-party claims, is legally incorrect. The trial court's analysis failed to take into consideration: 1) attorney fees (which under the mechanics' lien and bonding statutes are awarded as a matter of right to the successful party); 2) the counterclaims and third-party causes of action which conservatively sought $75,000.00 in damages; and 3) the distinction between a lien foreclosure action and an action to obtain a monetary judgment, an important distinction recognized by the appellate courts of this state.

It was incumbent on the Defendants to make their offer clear and any ambiguity is, as a matter of law, construed against them. If an offer is ambiguous, being capable of more than one interpretation, the offeree is entitled to interpret the offer in light of any reasonable meaning and should not be placed at risk of having costs assessed against them if the offer is not reasonably clear.

Lastly the trial court, in setting the attorney fees Butters was entitled to as the "prevailing party" under the mechanics' lien and bonding statutes, committed error when in express contradiction to Rule 68 it utilized the offer of judgment for purposes of other than determining entitlement to costs.

ARGUMENT

I

The trial court abused its discretion when it refused to be guided by credible uncontradicted evidence when all other reasonable minds would have accepted such evidence. The trial court mistakenly concluded the unrefuted expert testimony of Butters' two civil engineers to be in conflict.

After the parties rested, the trial court took the matter under advisement and adjourned. Approximately (½) one-half hour later, the trial court rendered its decision finding that the reasonable value of the material, labor, and equipment provided by Butters was $17,978.24.[2] *(Finding 25)*

The trial court indicated that it used a combination of the evidence in arriving at its decision. After reviewing the Bovee compilation (Ex. 321), the Butters' original billing (Ex. 504), and Butters' modified time cards (Ex. 504)[3], the trial court stated that the most reliable evidence came from the Butters' unmodified time cards of 182 loads. *(Video record May 9, 2001, not transcribed.)*

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[2] The trial court's final award totaling the $17,978.24 was arrived at as follows:

$ 12,257.00	129 loads x $95.00 (1,677.33 tons of material ÷ 13 = 129 truckloads)
1,021.25	grader time soil
348.33	grader time Bovee
2,359.16	grader time Butters
1,892.50	compactor/loader
100.00	water truck
$ 17,978.24	

[3] Butters had attempted to determine the loads which were actually delivered to the site as the truck drivers would mark on their time sheet both the truck and the pup (trailer) as one load. The accounting department went back, and based on the truck and pup, attempted to adjust for both loads.

After deducting 7.3 loads for the bed liner in the Ford truck and deducting another 26 loads in reliance John Owens testimony, i.e., that he saw no loads delivered on Saturday, November 16, 1996, the trial court found that Butters had delivered 148.7 loads (182 -7.3 -26 = 148.7), which on the average contained 11.28 tons or 1,677.33 tons of material. *(Finding 25)*

Relying again on the testimony of John Owens, the trial court found that Butters was obligated to deliver minimum 13-ton loads and based on the shortage of 1.72 tons per load, (13 -11.28) she found that 1,933.1 tons should have been delivered (148.7 x 13) and that 1,677.33 tons were actually delivered (148.7 x 11.28). The trial court went on to rule that because there was a 255.77-ton shortage (1,933.1 - 1,677.33), that another 19.67 loads (255.77 ÷ 13) should be deducted for a total of 129 13-ton loads Butters had delivered. This finding by the trial court (i.e., that 1,677.33 tons were in fact delivered by Butters) totally disregarded the evidence presented by the expert engineering witnesses – witnesses whose qualifications to testify at trial as engineering experts were stipulated to by the Defendants. *(Vol. II p. 89 as to Nelson and Vol. II p. 145 as to Rush)*

In fairness to the trial court judge, it expressed some frustration with the Butters' records, which it found "not reliable." *(Finding 24)* From Butters' perspective, the most troubling aspect of the trial court's ruling was that the trial court found the evidence presented by the engineers to be "conflicting" and thus was totally disregarded:

> *23. The expert testimony of two engineers presented by Butters regarding the amount of fill imported to the site was conflicting and not helpful to the Court in determining the number of loads delivered by Butters to the site.*

Butters acknowledges that the trial court (particularly as a fact finder) has substantial discretion to determine the facts. In State v. Daniels, 40 P.3d 611, 617 (Utah 2002) the Utah Supreme Court quoting from State v. Pena, 869 P. 2d 932, 935 (Utah 1994) recently stated:

> We generally review a trial court's findings of fact under the deferential clearly erroneous standard. Id. at 935-36 (Utah 1994). Trial courts have primary responsibility for making determinations of fact and must be given deference in their factfinding role because they are in a better position to assess credibility and determine facts than an appellate court is. Appellate courts therefore owe broad deference to the trial court engaged in a factfinding role. Id.

Notwithstanding that the trial court is given great deference in its fact finding capacity, Butters' counsel respectfully submits that the trial court has no right to ignore the expert testimony or to otherwise fail to be guided by credible uncontradicted evidence when all reasonable minds would accept it. If this occurs, such constitutes an arbitrary and capricious action or decision.

In the case of De Vas v. Noble, 369 P.2d 290, 13 Utah 2d. 133 (Utah 1962), the Utah Supreme Court indicated that the trial court has a substantial amount of prerogative in weighing the evidence; however, it went on to hold that "the trial courts' prerogative does not go so far as to permit it to stubbornly ignore or refuse to be guided by credible, uncontradicted evidence when all reasonable minds would accept it. That could result in arbitrary and unreasoning denial or distortion of justice."

A. **Marshaling of Evidence**. Before discussing the Nelson and Rush testimonies, Butters' counsel is mindful that he has an obligation to marshal the evidence in favor of the courts' finding. Without attempting to shirk this responsibility, Butters' counsel would

respectfully submit that because the trial court was very explicit in holding: " *The expert testimony of two engineers . . . regarding the amount of fill imported to the site was conflicting . . .*" that the burden is limited to demonstrating that what the two engineers testified to did not conflict, but is easily harmonized and should have been of great value in determining the number of loads Butters delivered to the site.

Nonetheless, Butters' attorney has thoroughly read the trial transcript, and with the exception of the cross-examination which Defendants' counsel conducted, there is no other evidence, expert or otherwise, which would contradict or call into question either Mr. Nelson's engineering analysis or the core drilling and soils analysis performed by Mr. Rush. The only testimony which would remotely come close is that of John Owens, the foreman who the trial court found was hired by Mr. Bovee to bring the site to an asphalt-ready stage. The trial court relied upon this testimony to find that 26 loads of material were not delivered on Saturday, November 26, 1996, as claimed by Butters. However, this testimony does not refute the testimony of Mr. Nelson that there had been 61,122 cubic feet of material delivered to the site (of which Bovee can only account for 146 truckloads). The testimonies of Merv Holgate and Tim Bovee do not rebut or refute in any respect Mr. Nelson's or Mr. Rush's testimony, but simply focuses on compaction and other issues in relationship to the contract between Butters and Bovee.

The testimony of Abe Martinez fails to refute either Mr. Nelson's or Mr. Rush's testimony. Again, although the Defendants use a different proctor in determining the number of truckloads of material which were delivered, they adopted the testimony of Scott

Nelson. (Ex. 321) (Ex. 321 acknowledges that at least 293 13-ton truckloads of material were delivered to the site. Even taking Bovee's 293 13-ton truckloads and deducting the 146 Bovee claims to have imported, this still would leave Butters with entitlement to 147 (293 - 146) loads, or $13,965.00.

B. **Evidence of Loads Delivered to Site**. From the outset Butters knew that the Defendants were disputing the accuracy of the drivers' time sheets on which the loads delivered were recorded. In order to persuade the Defendants that they had imported the amount of material which they had invoiced, Butters dug test holes *(Shell test holes - Vol. II, p. 148)* around the perimeter of the site and measured the depth of the materials (Ex. 507). Defendants were unconvinced. As a consequence, Butters felt that the most credible evidence would be to retain professional civil engineers to determine scientifically how much material had been imported to the site and what portion could be attributed to Butters. This was possible because prior to any construction (and the importation of any materials) a pre-construction site survey with known elevations had been prepared. *(See Ex. 509)* Consequently, with an "as built" topographical survey one could mathematically determine the total amount of material imported to the site.

In order to understand how disparate the trial court's finding that only 129 loads of material were imported to the site by Butters viz-a-viz the expert testimony of the two civil engineers, one must first understand the formula which the expert witnesses were using to convert cubic feet and cubic yards of material to tonnage of material. The formula to undertake the necessary conversions are set forth below:

Formula:	**Example of formula:**
Cubic yards x 27 = Cubic feet of material	2,263.78 cu. yds. x 27 = 61,122
Cubic feet x proctor = Pounds of material	61,122 cu. ft. x 137.8 = 8,422,611
Pounds of material ÷ 2,000 = Tons of material	8,422,611 lbs. ÷ 2,000 = 4,211.31
Tons of material ÷ 13 (tons) = Truckloads	4,211.31 tons ÷ 13 = 324 truckloads

(Testimony of Scott Nelson, Vol. II, pp. 106-113)

C. **Scott Nelson's Testimony - Total Amount of Material Imported to Site by All Parties Determined by Topographical Survey**. Scott Nelson testified as to the total amount of material imported to the site by both Bovee and Butters. After explaining the methodology he employed to obtain the datum from his "as built" topographical survey of the site, Scott Nelson, a civil engineer with 20 years of experience *(Vol. II, p. 126, line 10)*, testified that in his opinion a total of 61,122 cubic feet of material had been imported to the site by all parties. *(Vol. II, p. 112–See also Ex. 511A, 511B, 511C, and 511D.)*

Below (converted to truckloads) is the *total amount of material* which was imported to the site, based on the various proctors[4] as testified by Scott Nelson and Alex Rush.

Cubic feet	61,122	61,122	61,122	61,122
Proctor	133	135	137.8	145
Pounds	8,129,226	8,251,470	8,422,612	8,862,690
Tons	4,064.6	4,125.74	4,211.31	4431.35
Truckloads (based on 13 ton loads)	313	317	324	341

[4]Proctor refers to the weight of the material. *(Vol. II, p. 222)* Both expert witnesses testified as to the proctor of the material. Exhibit 511 prepared by Scott Nelson used a proctor of 137.8. *(Vol. II, p. 112)* Scott Nelson testified that Butters' material had a proctor of between 135 and 145 (*Vol. II, pp. 111-3*). Alex Rush testified that the proctor of the material was not less than 133 pounds per ton and likely was greater. One hundred forty-seven (147) is the proctor for course natural pit run which is what Butters' material is classified as. (*Vol. II, p. 248, line 14-23)*

The above figures reflect the total truckloads of material imported to the site by all parties. As stated above Scott Nelson testified as to the total amount of material imported to the site by both Bovee and Butters. In order to determine the amount of material delivered by Butters, one would only have to subtract the amount of loads that Bovee claims to have delivered to the site. (146 loads–See Ex. 321) The simplicity of Nelson's approach is that it is simply a volume analysis based on the specific material (dirt) imported to the site. It recognizes the fact that the site has been raised to its current the level, a fact which cannot be denied, whether or not one or more witnesses saw or did not see loads delivered on a specific date or whether Butters' time sheets were or were not accurate. Giving full credit to the loads that Bovee claims to have imported to the site, from a mathematical and civil engineering perspective the only other way the site could be at the current level is if Butters had, in fact, delivered at least 167 to195 13-ton loads (313-146 or 341-146). This is simply a function of volume and mathematics with known beginning and ending values.

D. **Alex Rush's Testimony - Amount of Material Imported to Site (Parking Lot and Roadway) by Butters Determined by Analysis of Core Drillings**. Alex Rush, a civil engineer with 20 years of experience, *(Vol. II, p. 178)* testified that based upon his investigation, between 38,020 to 39,025 of cubic feet of material had been imported to the site by Butters. Below (converted to 13-ton truckloads) is the amount of Butters' material which Mr. Rush determined Butters had imported to the site:

Cubic feet	38,020	39,015	38,020	39,015
Proctor	133	133	137.8	137.8
Pounds	5,056,660	5,188,995	5,239,156	5,376,267
Tons	2,528.33	2,594.5	2,619.5	2,688.1
Truckloads (based on 13 ton loads)	194.5	199.5	201.5	206.75

E. **Comparison of Experts with Trial Courts' Finding**. A comparison of the expert witnesses' testimonies viz a viz the judge's findings is set forth below. Note all figures reflect 13-ton truckloads:

Judge Heffernan's Finding	Rush's Testimony	Nelson's Testimony
129 Truckloads	194 - 207 truckloads	313-341 truckloads -146 Bovee loads 167-195 Butters

F. **The Evidence is Not in Conflict**. It is respectfully submitted that the trial court misapprehended the expert testimonies offered by the two civil engineers. Each expert approached the problem using a different methodology, and each gave an opinion that would be of value to the fact finder. No testimony was offered to refute or rebut their opinions. Granted the testimonies did not dovetail with one another; they were not intended to. They did, however, bookend each other's conclusions, and each accounted for the loads which Butters claimed were imported to the site.

Mr. Rush testified that he located material consistent with Butters pit run that was imported to the site - all from one source. (Vol. II, p. 172, p. 182) (the understood implication at trial was that source was Butters' pit) in the range of 38,020 and 39,015 cubic feet. (Vol. II, p. 175, p. 219)

The trial court found the expert testimony was in conflict. In this regard, Butters respectfully submits the trial court misunderstood that *Mr. Nelson was testifying to the total amount of material which was imported to the site (by all parties)*, and that *Mr. Rush was testifying (based on his analysis and methodology) about the total amount of materials which came from one source, and that source was consistent with the material from Butters' pit. (Vol. II, p. 167)* The trial court evidently expected both experts to testify as to the same amount, and the court apparently became confused when the experts (instead of testifying as to the same figure) approached the problem from two completely different angles (Mr. Nelson determining all material imported to the site and Mr. Rush focusing on determining what Butters had imported to the site) and used completely different methodologies.

Based upon the pre-construction site survey and the known elevations prior to construction *(Ex. 509)*, Mr. Nelson was able to survey the site and with his "as built" survey datum, he was able to mathematically determine that the total amount of material imported to the site was 61,122 cubic feet.

Mr. Rush, on the other hand, utilized a totally different methodology. Based upon his engineering experience and training, his approach was to "core drill" the site. Mr. Rush determined that the total amount of material attributed to one source (which was most similar to Butters' material) imported to the site was between 38,070 - 39,015 cubic feet of material. In addition, Mr. Rush testified that the material which he analyzed, based on the core drilling, was in fact imported from the same source and was not of the consistency of the

sandy material which Mr. Bovee claimed to have imported to the site. *(Compare Ex. 513 and Ex. 514.)*

Even assuming that all of the trucks delivering material to the site carried 13 tons (the minimum tonnage which the court found Butters had contracted to deliver to the site), given the scientific testimony of Scott Nelson this would require approximately 324 truckloads of material which had been imported to the site. (This also assumes that the material had approximately the same proctor of 137.8. Even assuming a proctor of only 135, this would still account for 317 truckloads of material.)

The trial court's finding that only 1,677.33 tons of material was delivered by Butters, which accounts for only 129 - 13 ton loads, logically fails to recognize that with the site at the current height (compared with the pre-construction topographical site survey - Ex. 509) then either someone mysteriously imported material or Butters was not given credit for the material it did, in fact, import to the site.

One of the ironies of the trial is that the trial court's finding (of the material delivered by Butters) ignores not only the engineering experts' testimonies but also the fact that even the Defendants agreed with Scott nelson's approach. See Defendant's Exhibit 321. The Defendants impliedly acquiesced that Scott Nelson's testimony was the single most important evidence available as to the amount of material imported to the site. (It is submitted that they did so based upon the accuracy of the methodology which he employed.) In Defendant's Exhibit 321, the Defendants acknowledge that there have been, exclusive of the front planter box, the building foot print and the landscaping area, 2010 cubic yards of

material or 54,207 cubic feet of material imported to the site. (This exhibit not only adopts in total Scott Nelson's testimony but then addresses the material underneath the building and the landscaping area, which accounts for the other 6,800 cubic feet of material, totaling the 61,122 cubic feet of material to which Mr. Nelson testified to - 54,207 + 6,800 = 61,122.)

The problem with the court's finding of only 129 13 ton loads having been delivered by Butters is that it fails to account for the site having been raised to the level it currently is at. Even accounting for all of the loads which Bovee claims to have delivered to the site, there are still approximately 38-66 loads of material which exist on the site which Butters claim to have delivered and which Bovee does not claim to have delivered. The court's findings totally ignore the fact that the site has been raised to a certain level and fails to account for how the site was raised to that level. The 167-195 loads would have a value of $15,865.00 - $16,525.00, which would make the other issues in relationship to the Offer of Judgment (discussed below) irrelevant.

The trial court's deduction of 26 loads (having a value of $2,470.00) is simply not supported by the scientific and engineering evidence. Otherwise, the site could not have been raised to the level at which it currently exists. The material did not appear by itself!

II

A monetary "offer of judgment" (particularly one that only partially disposes of the pending claims) is not more favorable than a judgment of foreclosure, which grants foreclosure of the mechanics' lien with a priority from the date materials were first delivered to the property, includes attorney fees, and disposes of all of the remaining claims. The trial court erred in awarding the Defendants their costs of court incurred after making their Offer of Judgment as the Offer of Judgment was not, as a matter of law, more favorable than the judgment finally obtained by Butters.

Rule 68 U.R.C.P. in pertinent part provides as follows:

(b) Offer Before Trial. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party *an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.* If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.* The fact that an offer is made but not accepted does not preclude a subsequent offer. *(Emphasis supplied by the Appellant)*

The Offer of Judgment made by the Defendants states the following:

"Comes now the above named Defendants by and through their attorney of record and tenders to this Court an offer of judgment, pursuant to Utah Rules of Civil Procedure, Rule 68. There is in dispute the amount due and owing on a verbal construction contract. Under the terms of that contract there was no provision for attorney's fees. However, the Defendants are mindful of the claim for attorney's fees being made against the Defendant McFarland. Inasmuch as this case can and might accrue significant attorneys fees and costs, and inasmuch as the Defendants are desirous of curbing those potential fees and costs, the Defendants are tendering the following offer, which includes costs, but does not include attorney's fees. The issue of fees can still

be presented to the Court for a final determination. The offer being tendered by the Defendants is Twenty Thousand Dollars ($20,000.00).
DATED: January 12th, 1999." **(Record 288-291)** *(Emphasis provided by the Appellant)*

A. The Offer of Judgment was Ambiguous. The primary purpose of an Offer of Judgment is to encourage settlements and avoid protracted litigation. Delta Air Lines v. August, 101 S. Ct. 1146 (1981) citing Moores Federal Practice. Butters would respectfully suggest that Rule 68 contemplates a global settlement. In this case, the Offer of Judgment was ambiguous[5] (i.e., an offer capable of more than one meaning) and as a matter of law, any such ambiguity in the offer must be construed against the drafter. Did the Offer of Judgment include the dismissal of the counterclaims and third-party claims? Butters did not know if it did or did not, a strict interpretation of the offer would be no. Did the Defendants intend the judgment to relate back to the date of the lien or only from the date the offer was accepted and judgment eventually entered? It is not known. Was the offeree conceding that since the underlying claims (mechanics' lien statute and bonding statute) allowed for attorney fees that trial court should award attorney fees incurred to the date of the offer of judgment? Unlikely, if this was the case, they could have clearly stated such. (More likely the offer was a potential trap to prevent attorney fees from being recovered - see discussion

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5 "A contract is ambiguous if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence and understanding. See *id.* at 1274-75; *Nielsen*, 848 P.2d at 666. Ambiguities are construed against the drafter . . . See *Alf*, 850 P.2d at 1274; *Nielsen*, 848 P.2d at 666." *Utah Farm Bureau Ins. Co. v. Crook, 980 P.2d 685, 686-687 (Utah 1999)*

below.) Whatever can be said of the Offer of Judgment, it was not a global settlement or an offer that would have resulted in the avoidance of protracted litigation as the issue of attorney fees and the $75,000.00 in counterclaims and third-party claims were left unresolved and would have to be litigated.

Since the Defendants' attorney prepared the offer, if there is any question as to what Defendants intended it must be construed against them. See Aikens v. Ludlum , 113 N.C. App. at 826, 440 S.E.2d at 321. Any ambiguity in the offer must be construed against the drafter. *Id.* at 826-7, 440 S.E.2d at 322; see also Hicks v. Albertson, 284 N.C. 236, 241, 200 S.E.2d 40, 43 (1973) ("If this was not the interpretation intended by the defendant, the misunderstanding is due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom.")

B. The Judgment (of Foreclosure) Obtained Following Trial Is More Favorable than the Offer of Judgment. The question on its face appears to be a straightforward proposition: Is a $20,000.00 monetary judgment as of January 12, 1999 (with unresolved issues as to who, if anyone, is entitled to attorney fees and unresolved issues as to the counterclaims and third-party causes of action) more favorable than the result which Butters obtained following trial? Because the Defendants' offer is ambiguous, it is difficult to know exactly which aspects or components of the pending action to place in the balance to determine whether the Offer of Judgment was less favorable or more favorable than the final judgment.

The judgment obtained following trial had several components:

1) an Order of Foreclosure with respect to the mechanics' lien;

2) an award of costs;

3) an award of attorney fees to be taxed as costs in the matter;

4) a personal judgment on the bonding statute[6] cause of action; and

5) lastly, a complete dismissal of the counterclaims and third-party causes of actions conservatively totaling $75-100,000.00.

Rule 68(b) U.R.C.P. requires the trial court to analyze and account for each of these components--including the significant differences between a monetary judgment and an order of foreclosure. Because there are important fundamental differences between these two types of judgments, the issue determined by the trial court required a legal analysis which was more complex than simply comparing numbers. Given a strict interpretation of the offer, Butters would respectfully submit the proper comparison would graphically be represented as follows:

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[6] The bonding statute is an auxiliary to the mechanics' lien statute. Recovery on a mechanics' lien claim does not prevent recovery on the bonding statute claim as well. See King Bros., Inc. v. Utah Dry Kiln Co., 13 Utah 2d 339, 341, 374 P.2d 254, 255-56 (1962); Rio Grande Lumber v. Darke, 50 Utah 114, 124, 167 P. 241, 245 (1917). See also Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421, 428 (Utah App. 1994). (When determining whether attorney fees should be awarded under the bond statute, the trial court should consider precedent treating the Bond Statute as auxiliary to the mechanics' lien statute and as sharing with it a common purpose.)

Offer of Judgment	Results Obtained Following Trial
$20,000.00 Monetary Judgment	$ 17,978.74 Judgment of Foreclosure
Priority as of date judgment entered	Priority as of date first labor or materials
Attorney fees issue left unresolved	$7,751.21
Count I -$9,755.00 Declaratory Judgment claim left unresolved	Count I - Dismissed
Count II - Open-ended Slander of Title claim left unresolved	Count II - Open ended claim dismissed
Count III - $27,000.00 Interference with Bovee Economic Advantage left unresolved	Count III - $27,000.00 dismissed
Count IV - $32,000.00 Interference with Holgate Economic Advantage left unresolved	Count IV - $32,000.00 dismissed
Count V - $20,000.00 Punitive Damage claim left unresolved	Count V - $20,000.00 dismissed

Even though the trial court acknowledged that a portion of the property in question had been transferred after the lien had been filed *(Record 737)* and that the judgment of foreclosure would be of greater value relating back to the lien date rather than the judgment date, the trial court focused only on the first component (dollar value) and made a simple comparison of $20,000.00 versus $17,978.74. This approach is too simplistic given the language mandated by Rule 68. Rule 68 requires the court to perform an analysis of the entire results obtained after trial and compare that with the Offer of Judgment; one cannot simply pick and chose components of the dispute to compare. If the total result following trial is more favorable, then, and only then, is the offeree entitled to recover their post Offer of Judgment costs of court. In this instance the trial court felt that allowing the Defendants to obtain their post-offer costs furthered the purpose of Rule 68, i.e., to encourage settlement and avoid protracted litigation. *(Record 737)* However, in this case, it is respectfully submitted that the trial court's ruling allows a party to circumvent the very purpose of Rule 68. Rule 68 was designed to put an end to the litigation, not chose bits and pieces and then having obtained a result in a portion of the litigation more favorable than the other party in

a portion of the litigation be allowed to claim that they are entitled to their post Offer of Judgment costs. Where is the fairness in that result?

Butters eventually obtained a judgment of foreclosure, exclusive of costs, of $25,729.95 ($17,978.74 plus $7,751.21 attorney fees to the date of the Offer of Judgment). The trial court failed to take into consideration Butters' attorney fees incurred up to the date of the Offer of Judgment. It is respectfully submitted that because the attorney fees in a lien foreclosure action are statutorily mandated to the "successful party" that the trial court committed error in failing to consider them as an integral aspect of result obtained viz-a-viz the Offer of Judgment. Properly framed, the question the trial court needed to answer was: Was the judgment of foreclosure finally obtained by Butters (the offeree) more favorable than the monetary offer made by the Defendants? Unless one is familiar with construction law matters, particularly mechanics' lien law, one's initial impression may be no; however this would be incorrect.

The Defendants' Offer of Judgment was for the sum of $20,000.00. It included costs[7], but excluded attorney fees, which the Defendants expressly reserved to be presented "to the court for a final determination." *(Record 229-241)* The offer is unambiguous to the extent that it is only an offer for a monetary judgment. (It did not offer to allow the entry of an order of foreclosure relative to the mechanics' lien claim.) The offer, however, was

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[7] Under the rationale of the Aikens v. Ludlum decision, *infra*, it could be argued that the Defendants' Offer of Judgment was ambiguous in this respect. The Aikens court held the phrase "together with costs accrued" was ambiguous as to whether the "costs accrued" were included in the $45,001.00 figure or whether the costs were left to be separately determined by the court.

incomplete and ambiguous to the extent that it did not address either the Defendants' counterclaims or the third-party causes of actions. Because of these ambiguities the answer to the question may be that it is too complex for a court to make a meaningful analysis or comparison to answer the question.

C. The Defendants' Offer of Judgment was a "Trojan Horse" Offer!

Whether the Defendants' intended their Offer of Judgment to be ambiguous, it contained a potential trap as it relates to the issue of attorney fees in a mechanics' lien case. Those familiar with Utah construction law, particularly mechanics' lien claims, can see the latent ambiguity of the offer. In order to be entitled to attorney fees, Butters must "successfully enforce the lien." See Reeves v. Steinfeldt, 915 P.2d 1073, 1079 (Utah Ct. App.1996); Palombi v. D & C Builders, 22 Utah 2d 297, 300-01, 452 P.2d 325, 327-28 (1969). Conversely if Butters fails to obtain an order of foreclosure which is necessary to enforce the lien, Defendants are entitled to attorney fees. Kurth v.Wiarda, 991 P.2d 1113 (Utah App. 1999).

What exactly did the Defendants intend when they stated: "The issue of fees can still be presented to the Court for a final determination?" Again, any attorney familiar with mechanics' lien claims, knows that a monetary Offer of Judgment does not get you attorney fees. See AAA Fencing Co. v. Raintree Development and Energy Co.,714 P.2d 289, 293 (Utah 1986) where the court awarded attorney fees against the plaintiff (mechanics' lien claimant) who failed to obtain an order of foreclosure with respect to its lien.

Had Butters accepted the offer of a monetary judgment, it would not under Utah law have been entitled to "successful party" status, and thus would not have been entitled to any award for attorney fees under §38-1-18 U.C.A. On the contrary, the Defendants could then rightfully claim that since all that Butters obtained was a monetary judgment they were the "successful party" with respect to the lien foreclosure cause of action. *c.f.*, Kurth v.Wiarda, 991 P.2d 1113 (Utah App. 1999). (When Wiarda, a mechanics' lien claimant, failed to obtain an Order of Foreclosure with respect to his lien, the award of attorney fees against him was mandatory.) See also Reeves v. Steinfeldt, 915 P.2d 1073 (Utah App. 1996) which held:

> Section 38-1-18 provides in part, "in any action to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action." Id. (emphasis added). ***The language of this statute is mandatory, not discretionary***, see *Richards v. Security Pac. Nat'l Bank*, 849 P.2d 606, 612 (Utah App.1993) (awarding attorney fees on appeal), thus an award of reasonable attorney fees is appropriate. We therefore remand this case to the trial court for an award of such fees. *(Excerpt from page 1079 - emphasis provided by Appellant)*

Assuming that the attorney fees incurred by the Defendants up to the Offer of Judgment were similar to Butters (approximately $7,750.00), then in order to compare the Offer of Judgment (as of the date of the Offer of Judgment) you would have to include in the analysis the respective parties' attorney fees. Depending on the type of case involved, the inclusion of attorney fees may or may not be required. However, because they are awarded to the "successful party" as a matter of statutory right, once a lien foreclosure claim is made and would therefore reduce Butters' award if it had accepted the offer for a monetary

judgment, the proper comparison must be based upon the inclusion of attorney fees, otherwise the court is ignoring the underlying nature of a mechanics' lien cause of action which this case was:

Offer of Judgment	$20,000.00	Judgment Obtained	$17,978.74
Less Attorney Fees	-$ 7,750.00	Attorney Fees	+$7,751.21
Net Amount	$12,250.00	Net Amount	$25,729.95

Because the Defendants chose to word their offer in the manner they did, the judgment of foreclosure obtained by Butters was more favorable than the offer of a monetary judgment made by the Defendants.

Butters firmly believe the Defendants intended this consequence[8] because the offer was very carefully worded and intentionally left ambiguous in this regard. The courts should not sanction any attempt to trick or allow a party to gain a tactical advantage over another party and then allow that party to claim or represent that the offer was something other than what it was. This is simply *estoppel in pias* in its most simple application.

Had the Plaintiff accepted the Defendants' Offer of Judgment (which provided only for a monetary judgment and expressly reserved the issue of attorney fees yet to be determined by the court), then the issue of attorney fees would have been resolved in the Defendants' favor. The Plaintiff would not have been successful in obtaining an Order of

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[8] Butters' assertion that the Defendants' attorney intentionally and very carefully crafted the offer to be a "Trojan Horse" offer is not based on speculation or paranoia. Taking into consideration the carefully worded Offer of Judgment and Defendants' post trial motion seeking attorney fees, it is evident that the Defendants were attempting to lay a trap by vaguely wording the offer and reserving the attorney fees issue to the court.

Foreclosure of the lien, and the Defendants would then be able to claim that they had successfully defended against the lien foreclosure action. Consequently, they would have been entitled under §38-1-18 U.C.A. to their attorney fees. Kurth v. Wiarda, *supra.* Because of this potential trap, the Defendants' Offer of Judgment was not accepted. The trial court dismissed this concern and stated that Rule 68 contemplates that a party making an offer does so in "good faith." *(Record 737)*

With all due respect, such legal platitudes are easy to pronounce, particularly with 20/20 hindsight. However, it ignores the overriding legal principle that if an offer is ambiguous it is to be construed against the drafter. Had Butters' counsel advised accepting the offer of a monetary judgment and then been faced with the argument that without an order of foreclosure he was not the successful party, there is no legal principle allowing rescission of Butters' acceptance based upon a unilateral mistake. (No matter how strongly the trial court feels about "good faith" and "fairness" the offeree is still placed in the position of having to second guess what the Defendant's Rule 68 offer encompasses and more importantly an allegation of malpractice.) Having then relied upon an interpretation that appears reasonable, Butters is faced with the prospect of having fees awarded against them (having taken the offer, but failed to obtain a judgment of foreclosure) or in the alternative be assessed costs for having failed to interpret the Offer of Judgment in the same manner that the trial court in 20/20 hindsight does. This is the primary reason the courts have universally required that offers of judgment be construed against the drafter if there is any ambiguity, i.e., to prevent a party from maintaining duplicitous positions.

A fortiori, given the significant fundamental differences between a monetary judgment and an order of foreclosure (particularly where the Defendants' Offer of Judgment was only a monetary judgment of $20,000.00, inclusive of costs, but exclusive of attorney fees - thus exposing Butters to an award of attorney fees in favor of the Defendants, while not resolving the counterclaims or the third-party causes of actions) is there any real question that the result obtained at trial was significantly "more favorable" than the consequences which would have resulted had the Plaintiff accepted the $20,000.00 amount offered under the January 12, 1999, Offer of Judgment? The Defendants simply cannot have it both ways, and any ambiguities in their offer must be construed against them.

D. The Relation Back Component to the Foreclosure Judgment. The Judgment of Foreclosure finally obtained by the Plaintiff (the Offeree) was far more favorable than the monetary offer made by the Defendants. In order to understand why the Defendants' offer was less advantageous, one needs to understand and appreciate the fundamental differences between simply obtaining a monetary judgment versus obtaining an order foreclosing the mechanics' lien. A monetary judgment (which is what the Defendants' Offer of Judgment was) becomes a lien against the property owned by the Judgment Debtors *as of the date of the judgment is docketed*. §78-22-1 U.C.A. It does not relate back to the lien date in any fashion. An order foreclosing the lien relates back to the date the first work was performed on the property by any contractor, subcontractor, or materialman. See §38-1-5 U.C.A.; Duckett v. Olsen, 699 P2d. 734 (Utah 1985). A monetary judgment thus can affect only the persons against whom the judgment is entered, whereas

an order foreclosing the lien can affect any person who in the interim has either purchased or acquired a security interest in the property on which the lien was filed. In the case of a monetary judgment, a lender or buyer could acquire a superior position in the property if the monetary judgment was obtained after the security interest or sale was recorded. In Contrast, if an order of foreclosure is obtained, any loan or sale made after work was first performed on the property would be junior to the mechanic lien being foreclosed under the Order of Foreclosure. These are very important distinctions, particularly in this case, because as the evidence at trial established, the larger portion of the property (all of the roadway and all of the property laying east and north of roadway) which the lien encompasses has been sold to a third party (who was not a party to the action), but upon whom the order of foreclosure is binding. If the Defendants' Offer of Judgment had been accepted, then the portion of the property sold to this person would not be subject to the Order of Foreclosure, whereas with an Order of Foreclosure, even this portion of the property will be subject to the court's decree.

III.

The trial court erred when it limited Butters' attorney fees to the amount it incurred pre Offer of Judgment, particularly when the trial court did such in contradiction of the express language of Rule 68.

The trial court determined that Butters was the "prevailing party" and was entitled to an award of attorney fees. *(Record 737)* However, as a matter of law,[9] the trial court limited Butters to the attorney fees incurred pre Offer of Judgment.

Irrespective of what this court does with the previous issues, Butters submits it was error for the trial court to limit its recovery to only the pre Offer of Judgment fees for two reasons:

1) Such is contrary to the express language of Rule 68; and

2) Such is expressly contrary to the legislative intent and purpose of §38-1-18 U.C.A., then in effect.

A. Such Is Contrary to the Express Language of Rule 68.

Rule 68 (b) U.R.C.P. specifically instructs the trial court to disregard the Offer of Judgment except to determine costs. Rule 68(b) provides in pertinent part: " . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a

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[9] The pertinent portion of Conclusion of Law No. 3 provides: *Said reasonable attorney fees and costs are only to be assessed up until the time the Defendant filed their Offer of Judgment with the Court and the amount of the fee awarded shall be in conformity to the Court's decision dated August 3, 2001.* It is clear from the way in which the trial court phrased this Conclusion that it was limiting the fees not based upon a finding that this amount was all that was reasonable, but on its legal conclusion that this is all that the law allowed.

proceeding to determine costs.. . ." In relationship to the issue of attorney fees, Rule 68 mandates that the fact the Defendants made an Offer of Judgment is irrelevant, including any endeavor by the Defendants to make an end run around the plain meaning of §38-1-18 U.C.A. Any other attempt to interject it into the proceedings or for the trial court to use such as a basis to limit fees or use it in any manner, other than to determine costs, is improper. Therefore, except for the matter of costs, it should have been a complete non factor for all other purposes of the litigation, including the determination of the amount of attorney fees that Butters was entitled to.

The trial court did not disregard the offer (as it should have) and in setting the amount of attorney fees, limited Butters to those fees incurred pre Offer of Judgment. It is interesting to note that §38-1-18 U.C.A. was amended (effective April 30, 2001) to allow the court to do exactly what it did. However, this was not the law in effect at the time of trial, and it was error for the trial court to disregard the express language of Rule 68 and §38-1-18 U.C.A. and in contravention of Rule 68 limit Butters' attorney fees to those incurred prior to the Offer of Judgment.

B. Such Is Expressly Contrary to the Legislative Intent and Purpose of §38-1-18 U.C.A. Then in Effect. As noted above, §38-1-18 U.C.A. (in effect April 30, 2001) provides for precisely the same result that Judge Heffernan reached. Why then should this court overturn her decision?

The fact that the legislature had to change the law to obtain that result should in and of itself be irrefutable and conclusive that the trial court's ruling was contrary to the law in effect at the time of the trial. (Otherwise, why did they have to change it?)

The trial court expressed frustration with the fact that both parties had incurred significant attorney fees trying to resolve this dispute. Obviously, the decision *(Record 737)* to limit Butters' attorney fees reflects the trial court's belief that, in part, this was the result of Butters' failure to accept the Offer of Judgment. However, the trial court also recognized that at first the Defendants denied altogether the validity of Butters mechanics' lien or that they were entitled to any amount of recovery. Later, Defendants' changed their position to one where they acknowledged Butters were entitled to approximately $9,000.00 for the improvements made to the property. *(Record 737)* It did not escape the trial court's attention that even though an undisputed sum of $9,000.00 was acknowledged as being due, the Defendants never tendered the undisputed amount thereby forcing Butters to pursue the lien foreclosure action to a conclusion. What the trial court failed to mention, however, (but which is apparent from the file) is that from the outset, Bovee, Holgate, and McFarland retaliated against Butters by filing over $75,000.00 of counterclaims and third-party claims. In light of the Defendant's complete failure to even introduce any evidence on these claims (which were all dismissed), it is obvious that the only reason Defendants filed these claims in the first place was to put Butters at risk for pursuing their lien claim. As a result, Butters were required to proceed to trial and recovered almost twice the undisputed sum. *(Record 737)*

Under the circumstance, Butters respectfully submits that it is not only unfair to Butters from a due process (notice) perspective to limit their fees, but that given the then-version of §38-1-18 U.C.A., it was contrary to the then legislature's intent as well as this Court's decision in A.K. & R Whipple v. Guy, 47 P.3d 92 (Utah App. 2002) which adopted a "prevailing party" analysis specifically requiring the trial court, in making an award of attorney fees, to take into consideration the fact that Butters prevailed on the $75,000.00 worth of counterclaims and third-party claims. By limiting attorney fees to only the pre-Offer of Judgment, i.e., the trial court erred in applying the "prevailing party" standard this Court adopted A. K. & R. Whipple v. Guy, supra.

Due Process. Since this case arose prior to the enactment of §38-1-18 U.C.A. effective April 30, 2001, how would Butters (and Butters' counsel) be on notice that their failure to accept the January 1999 Offer of Judgment would have the effect of limiting the amount of attorney fees they would be entitled to, particularly in light of Rule 68 which indicates that such a result is contrary to Rule 68. Nothing prior to the enactment of §38-1-18 U.C.A. effective April 2001 (not any case or Rule 68 itself) could have put Butters on notice of the result the trial court reached, which, as a matter of law was contrary to the express language of both Rule 68 and §38-1-18 U.C.A., then in effect.

CONCLUSION

The trial court's finding that the two engineering experts respective testimonies conflicted with one another is not supported by the record. On the Contrary their testimony

simply demonstrates that they approached the problem (how much material was imported to the site and how much is attributable to Butters) from different angles using different methodology. Mr. Nelson testified as to the total amount of material imported to the site by all parties. Mr. Rush testified as to the amount of material imported to the site by Butters. There was no conflict in their respective testimony. If anything their testimony merely book ended the issue.

Given the significant fundamental differences between a monetary judgment and an order of foreclosure, there is no question that the result obtained at trial was significantly "more favorable" than the consequences which would have resulted had Butters accepted the $20,000.00 offer. The Defendants' Offer of Judgment was only a monetary judgment, inclusive of costs, but exclusive of attorney fees, and thus exposed the Plaintiff to an award of attorney fees in favor of the Defendants, while not resolving any of the pending counterclaims or the third-party causes of actions seeking damages conservatively in the range of $75,000.00. The result following trial included not only an order of foreclosure of the mechanics' lien, but also a judgment against the property owners under the bonding statute and the dismissal of the Defendants' counterclaims and the related third-party causes of actions. The Defendants' offer was not more favorable than the results Butters obtained following trial, and no attempt to massage the facts could ever result in a rational conclusion that it was more favorable.

Rule 68 (b) U.R.C.P. expressly provides that an Offer of Judgment in any event is only relevant for determining costs, not attorney fees. For the reasons stated above, Butters

respectfully submits the trial courts' Conclusion of Law, limiting attorney fees to just the amount incurred pre Offer of Judgment was error.

Butters would respectfully request that the Court of Appeals reverse and remand with instructions to allow Butters their costs and their full reasonable attorney fees and to take into consideration the testimony of the two engineering experts or in the alternative remand for a new trial as to the issue of the amount of material imported to the site by Butters.

In addition, because this matter involves a mechanics lien, Butters would request that the Court of Appeals enter as part of its decision that Butters is entitled to its reasonable attorney fees and costs incurred on appeal.

Respectfully submitted this 9th day of June, 2003.

HARRIS, PRESTON & CHAMBERS

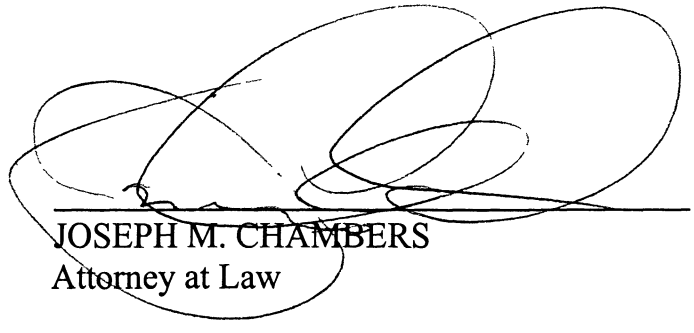
JOSEPH M. CHAMBERS
Attorney for Plaintiff/Appellant

(Original signature)

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT and ADDENDUM were mailed, postpaid, to the following this 9th day of June, 2003:

J. Paul Stockdale
795 East 24th Street
Ogden, Utah 84401



JOSEPH M. CHAMBERS
Attorney at Law

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